No. 791

UNITED STATES OF AMERICA

IN THE

SUPREME COURT

LIVINGSTON E. OSBORNE,
Petitioner,

vs.

A. J. HASTINGS, Sheriff of
Berrien County, Michigan,
Respondent.

PETITION FOR CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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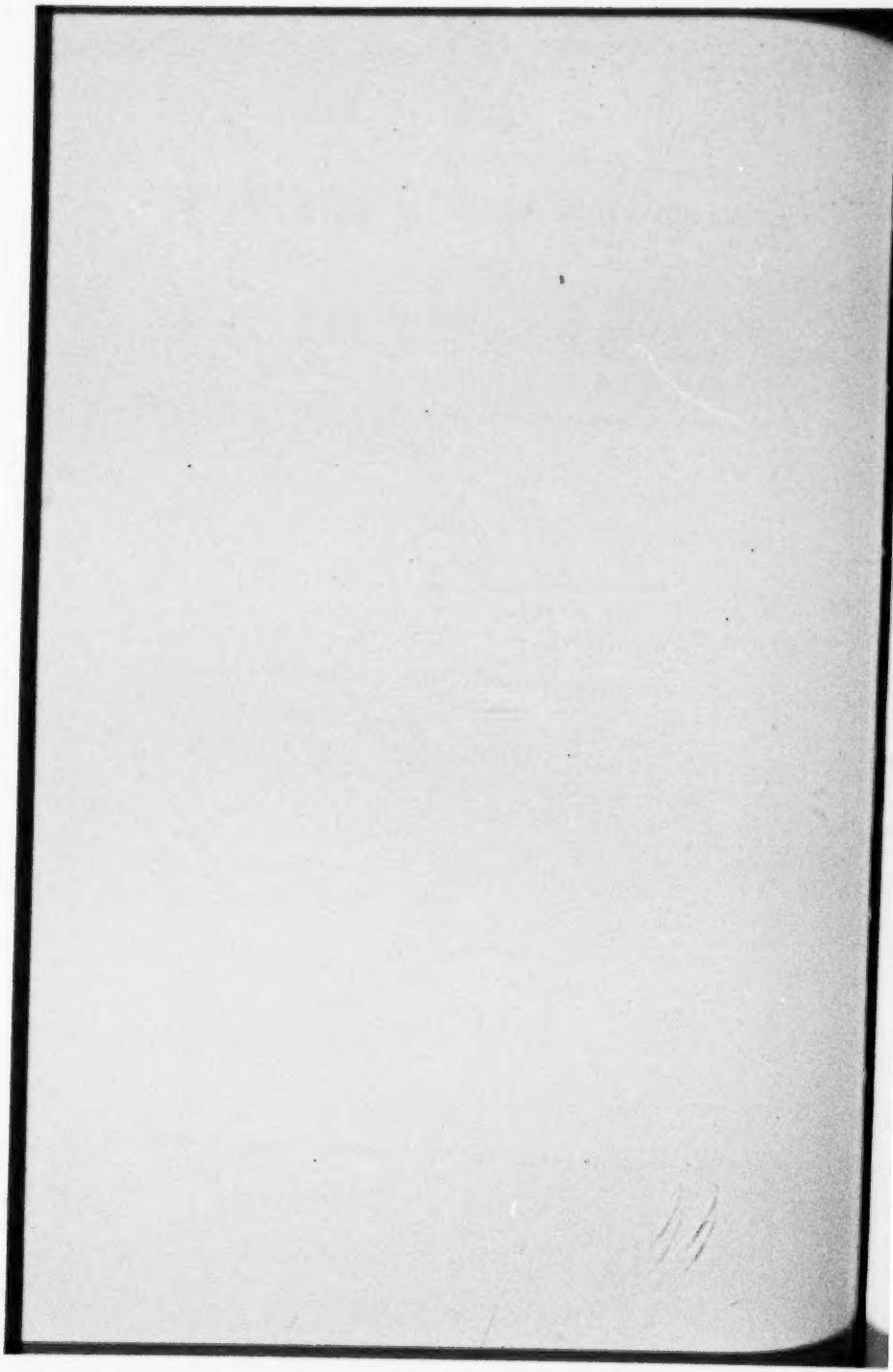

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TO THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Livingston E. Osborne, of the City of Chicago, State of Illinois, by Dean S. Face, his attorney. respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the case of A. J. HASTINGS, Sheriff of the County of Berrien, State of Michigan, Defendant and Appellant vs. LIVINGSTON E. OSBORNE, Plaintiff and Appellee, Docket No. 9259, in which final judgment was rendered on December 1, 1942, in favor of said respondent and against this petitioner, reversing and setting aside the judgment theretofore rendered by the District Court of the United States for the Western District of Michigan in said cause, to the end that said cause may be reviewed and determined by this honorable Court and that the judgment of said Circuit Court of Appeals be reversed and such further relief be adjudged as may seem proper.

Petitioner presents a summary and statement of the case, the basis of jurisdiction of this Court, the questions presented and reasons relied upon by petitioner for allowance of a writ of certiorari as follows:

(Numbers in parentheses refer to pages of printed record of Circuit Court of Appeals)

1. Summary and Statement of Case.

This is an action for the escape of a civil prisoner (3-6). Petitioner is a citizen of Illinois; respondent is a citizen of Michigan and is sheriff of Berrien County (3, 5). Petitioner recovered judgment in the District Court in the sum of $12,811.87 on January 31, 1942 (109). The Circuit Court of Appeals reversed the judgment on December 1, 1942.

Petitioner's cause of action arose as follows:

Petitioner's assignor, Saul B. Optner, trustee in bankruptcy for O. W. Richardson & Company, recovered a judgment in the District Court of the United States for the Western District of Michigan, Southern Division, against one Charles S. Abbott for fraud and deceit on October 31, 1933 (3, 8). In April, 1934, a writ of capias ad satisfaciendum was issued for the collection of this judgment (4, 8, 121 b). In May, 1934, the judgment-defendant was apprehended upon said writ in Berrien County, Michigan, and executed a jail limits bond under provisions of Michigan statutes, to be admitted to the liberties of the County of Berrien (4, 5, 8, 121 c). On February 15, 1940, the judgment-plaintiff Optner, trustee, as aforesaid, by authority of the Referee In Bankruptcy, sold and assigned said judgment with all rights under the execution and bond to the petitioner herein (5, 8, 121a). On April 26, 1941, said judgment-defendant, Abbott, escaped and went without the County of Berrien, and while he remained thus at large, this action was commenced (33-36, 101).

Under Michigan statutes, when a civil prisoner who has furnished a jail limits bond escapes from the county the judgment-plaintiff has his choice of two remedies.

(a.) To bring action against the sheriff, or

(b.) To take an assignment of the jail limits bond from the sheriff and sue the obligors thereon.

Michigan Compiled Laws, 1929, Sections 14736-14753. The statute applies to proceedings in Federal District Courts. Rules of Civil Procedure, Rule 69, Title 28 U. S. Code, Sections 843, 844, 845. Petitioner elected the first remedy and brought action against the sheriff.

Several defenses were pleaded by respondent, all of which were over-ruled by the District Court. The Circuit Court of Appeals over-ruled all of the defenses except one, but reversed the judgment of the District Court on the ground that said judgment-defendant, Abbott, in January, 1936, voluntarily surrendered himself to the seriff of Berrien County and was released from custody because petitioner declined to pay his board, and that said Abbott was thereby released from the restraint of the writ of capias ad satisfaciendum.

The claim of surrender arises as follows:
Under the Michigan statutes, the surety on a jail limits bond may surrender his principal by

(a.) Taking him to the keeper of the jail.

(b.) Making written requirement that such keeper take him in custody.

(c.) Whereupon the keeper shall endorse an acknowledgment of such surrender upon the bond, and, if required,

(d.) Give the surety a certificate acknowledging such surrender.

Michigan Compiled Laws, 1929, Sections 14734, 14735.

In the present case, while Optner, trustee in bankruptcy, still held the fraud judgment, the said Abbott interviewed the United States Marshal of the Western District of Michigan on January 18, 1936, and asked:

> "Whether or not I can go before the sheriff and give myself up and furnish the statutory $5,000 bond in lieu of the present $20,000 now the subject of the suit, and furge the writ."

The question was telephoned to Mr. Optner's attorney, who declined to become interested in the question (65, 66, 73, 75). At that time the said Abbott was claiming that the fraud judgment, the body executed and the jail limits bond were void (50, 51). Two days later the said Abbott went to the sheriff of Berrien County, when his surety was not present or represented. He presented nothing in writing, but he made a verbal statement in some form that he desired to surrender. He testified in the present case to several versions of this statement (45, 55, 57). The sheriff thereupon telephoned to the United States Marshal and the Marshal called Mr. Optner's attorney and said:

> "Mr. Abbott has presented himself for surrender to have his bond reduced to $5,000, so that it can be reduced to $5,000.00" (66, 67),

and asked said Optner's attorney whether he would pay said Abbott's board, and said attorney refused and confirmed it by letter to the Marshal, in which he stated that his client, Optner, trustee, did not agree to the procedure and did not consent to the cancellation of the bond (66-68).

The said Abbott testified in the present case on September 26, 1941, that at the time of testifying and some time prior to 1940, he opened a law office in Detroit and later one in Ann Arbor, and at the time of testifying had not resided at Berrien County for one year (56, 57). That is the only testimony in the entire case on that subject. Mr. Abbott was an attorney who had been in practice since 1897 (48).

The District Court held that the acts of Mr. Abbott did not constitute a legal surrender, and that he had deliberately ignored and omitted to comply with the law regarding surrender (103, 107, 108). The District Court rendered judgment for petitioner on January 31, 1942

(109). Respondent filed claim of appeal on March 27, 1942.

Petitioner moved to dismiss the appeal on the ground that respondent had waived his right to appeal and was estopped therefrom by bringing action against United States Fidelity & Guaranty Company, surety on the jail limits bond, before appealing, and that respondent thereby confirmed the judgment. This motion was denied as a part of the final decision of the Circuit Court of Appeals.

The Circuit Court of Appeals held that the alleged surrender of Charles S. Abbott was sufficient, stating its reasons and referring to certain decisions, and also saying:

> "We suggested in our opinion in *Optner v. Bolger*, supra, that the circumstances there considered invited, if they did not compel, a search for exceptions to an archaic rule governing imprisonment for debt and the consequences of an escape. Perhaps in this case we have found the invitation even more alluring, for it appears that since judgment in the earlier case Abbott for years has been out of Berrien County, has practiced law in Ann Arbor and in Detroit, has presented himself for various purposes before judges of this court in Detroit, Cincinnati and Louisville, and has been generally regarded as a nonresident of Berrien County. It also appears that the sheriff subjected to the judgment, never had custody of Abbott, knew nothing of the case, and was never in possession of the jail limits bond. Finally, it is also clear that the assignee of the judgment must have known, for they were matters of public record, of each of the defenses here and in the Optner case, asserted. The legal effect of these circumstances we do not consider, for we reach decision solely upon the view that the statute does not provide an exclusive method of surrender, that there is no Michigan authority that so holds, and that under the common law a voluntary surrender by the principal is effective where the plaintiff has notice of it, as in this case we had."

Petitioner moved to set aside the judgment of the Circuit Court of Appeals, and also moved for rehearing, claiming errors as to the law and claiming that the above quoted portion of the opinion showed that the Court was influenced by assumed facts not proved in the case but adopted as true because of personal observations of the Circuit Judges, and that such opinion as to the facts, though sincerely held, constituted bias and prejudice. The motions were denied.

2. Basis of jurisdiction of the Supreme Court.

This Court has jurisdiction of this cause because it is a civil cause finally decided by a Circuit Court of Appeals and reviewable by writ of certiorari. 28 U. S. Code, Section 347, Judicial Code, Section 240.

This Court has jurisdiction because the Circuit Court of Appeals exceeded its jurisdiction by finding and adopting as true, facts not proved or sustained by the evidence and not heard or considered by the District Court, and the adoption and consideration of such assumed facts was a departure from the accepted and usual course of judicial proceedings, which calls for the exercise of this Court's power of supervision.

3. The Questions Presented.

Petitioner claims that the said Circuit Court of Appeals committed prejudicial error to the injury of the petitioner in the following particulars:

(a.) The said Circuit Court of Appeals erred in denying petitioner's Motion to Dismiss the Appeal from the District Court.

(b.) Said Court erred in holding that the steps required to be taken for the surrender of a judgment debtor are mainly for the protection of the surety on the jail limits bond, and that such legal steps are of no service to the judgment-plaintiff.

(c.) Said Court erred in holding that Sections 14734 and 14735 of Michigan Compiled Laws of 1929 are permissive only, are not exclusive and do not control the

voluntary surrender of a judgment-defendant who is at large within the County on jail limits bond.

(d.) Said Court erred in holding that a judgment-defendant thus at large has a right of voluntary surrender without written application and without the keeping of a written record of surrender under common law.

(e.) Said Court erred in holding that common law right of surrender by such defendant under such circumstances is in force and effect in the State of Michigan.

(f.) Said Court erred in holding that said judgment-plaintiff, Saul B. Optner, trustee as aforesaid, had notice of the alleged surrender of said judgment-defendant, Charles S. Abbott, and that such notice was clear, sufficient and effective.

(g.) Said Court erred in that it reversed, in legal effect, the determination of the District Court

> "That there was no good faith attempt to comply with the statutory provisions relative to surrender, and that no valid surrender resulted",

said determination being supported by ample evidence and by the weight of the evidence.

(h.) Said Court erred in finding and adopting as facts that said Charles S. Abbott, judgment-defendant, since the said alleged surrender has for years been out of Berrien County, has presented himself for various purposes before the judges of the said Circuit Court of Appeals in Detroit, Cincinnati and Louisville, and has been generally regarded as a nonresident of Berrien County, such assumed facts not being shown by any evidence, not being admitted by petitioner and not having been heard or considered by said District Court.

(i.) Said Court erred in holding that the facts so assumed and adopted, as stated in the preceding paragraph, and the nature of the rule regarding civil imprisonment and escape invited, compelled or allured the Court to search for exceptions to such rule.

(j.) Said Court erred in denying petitioner's petition that its judgment be vacated and set aside on the ground that the Circuit Judges who rendered such judgment were biased and prejudiced and on the other grounds assigned in said petition.

(k.) Said Court erred in denying petitioner's petition for rehearing on the same grounds as stated in the preceding paragraph hereof.

4. Reasons Relied Upon for Allowance of Writ of Certiorari.

A. Petitioner claims that the Circuit Court of Appeals in this case has adopted a course of proceedings which is a wide departure from those generally accepted and followed, in that the Court assumed and adopted facts which were not shown by any evidence, but which were apparently drawn from personal observations of the Circuit Judges which they deemed sufficiently important to incorporate in their opinion and which were stated in such relation to the issues as to reveal that such assumed facts weighted upon their minds during consideration of the case, and indicated that because of such assumed facts the Court was inclined and swayed in favor of the respondent and against the petitioner, although the opinion states that the case is decided on other grounds.

B. Petitioner claims that the reasons stated for the decision, i. e., a common law right of surrender without written request or written record, is manifestly untenable because first, no proceedings similar to the general statutory Michigan procedure as to jail limits bonds, liberties of the jail limits and exoneration by surrender existed at common law, and more particularly, did not exist under the common law prevailing in Michigan; second, there was once a statute in Michigan which permitted surrender by the judgment debtor (Mich. Revised Statutes of 1838, Part III, Title VII, Chapter 1, Section 8), and this statute was repealed (Mich. Revised Statutes of 1846, Title XXXIII, Chapter 173, Section 1), and the legislature at the same time provided the procedure which now prevails (Mich. Revised Statutes of 1846, Title XXVIII, Chapter 147, Sections 6 and 7; readopted by Act

No. 314, Mich. Public Acts, 1915, now compiled in Mich. Compiled Laws of 1929, Sections 14734 and 14735); and third, the decision is in conflict with the general rule established in Michigan that surrender under civil process must be in strict accordance with the applicable statute.

Elliott v. Dudley, 8 Mich. 62;
Begole v. Stimson, 39 Mich. 228.

C. Petitioner submits with complete respect to the Circuit Judges, that the authorities to be found for their opinion, as shown therein, are so doubtful and remote and so clearly contrary to the weight of authority under similar statutes, and so inconsistent with the plan and scheme of Michigan procedure that but for their unconscious tendency and inclination to reverse the judgment of the District Court because of matters de hors the record, the judgment of the District Court would probably have been affirmed, and this Court should take action to review such unusual circumstances and correct the result thereof.

DEAN S. FACE,
Attorney for Petitioner.